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Non-Paternity Tests in Civil and Criminal Actions

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NOTES AND COMMENT

NON-PATERNITY TESTS IN CIVIL AND CRIMINAL ACTIONS.

Unnecessary confusion exists concerning the relation of medicine to law because of the common failure to distinguish between *law, legal medicine* and *medical jurisprudence*. This is clearly evident as illustrated by the publications on the subject of non-paternity [1] appearing in this LAW REVIEW.[2] *Medical jurisprudence* deals with the statutory and common law affecting medical licensing, practice and malpractice. *Legal medicine* is expert medical knowledge applied to the needs of law.[3] The technic and investigative results of legal medicine are eminently the problems of medical experts and can properly touch the law only as matter for judicial notice or as questions of fact. To define *law* is difficult; it seems that law is the plastic mold for civilized human conduct that responds to the internal pressure of the thing it seeks to shape and regulate. The law, in formulated rules of evidence, deals pre-eminently with probabilities and human experience.[4] It is from this point of departure that a sound, legal view of non-paternity tests may be approached.

The recent case of *Beuschel* v. *Manowitz* [5] involved the question of non-paternity tests, and Judge Steinbrink held that the defendant was properly entitled to an order requiring the plaintiff and her child to submit to blood tests, under Civil Practice Act, Section 306, the examination sought being relevant on the issue of paternity. The

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[1] Since iso-agglutination tests are of negative force, it is appropriate to speak of *non-paternity* rather than paternity tests; they are employed to exclude, not to prove, paternity. *Infra* notes 12, 14, 19.

[2] Mr. Schroeder in (1933) 7 ST. JOHN'S L. REV. 253, divided his article into sections dealing respectively with legal medicine and law. Dr. Wiener in (1933) 8 ST. JOHN'S L. REV. 70, discusses the subject as legal medicine. Dr. Schumacher in (1934) 8 ST. JOHN'S L. REV. 276, deals with the law on the problem.

[3] Schultz, *Present Status and Future Development of Legal Medicine in the United States* (1933) 15 ARCHIVES OF PATH. 542, at 543.

[4] "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men have had a good deal more to do than the syllogism in determining the rules by which men should be governed." HOLMES, THE COMMON LAW (1881) 1.

[5] 151 Misc. 899 (1934).

Appellate Division [6] unanimously reversed the decision of the lower court, both on the law and the facts.

The judicial process whereby the Appellate Division arrived at the decision to exclude non-paternity tests by indirection is obscured by an ambiguous memorandum. There are cogent and practical reasons for resolving this memorandum into its component parts. A variety of arguments have been offered against the acceptance of non-paternity tests as competent and relevant evidence.[7]

It has been assumed that the test is inadequate, limited in accuracy, and the subject of fundamental controversy among scientists.[8] The impression gained from such a statement, namely, that the evaluation of the test is a mere inference on the part of an expert, leads to the conclusion that the inference of non-paternity, based upon an antecedent inference, is too remote to justify acceptance.[9] Primarily, the solution of scientific problems is the province of the scientist and not of the lawyer;[10] herein lies the confounding of *law* and *legal medicine.* It is erroneous to assume that the non-paternity test is the subject of fundamental scientific controversy. National and international authorities in science are in agreement as to the technic, interpretation and application of the procedure.[11] The expert in stating the result of his test is delivering a scientific, factual proposition to the court; from this he derives his opinion in the particular case at bar. The original link in the chain is factual and not an inference in the legal sense. Hence, the argument against admission of such evidence, as inference based on inference, expires.

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[6] The memorandum reads in part: "Plaintiff may submit or not to the taking of her own blood but it plainly determines nothing. She asserts, and no one would gainsay it, that she is the mother of this child." 241 App. Div. 888 (2d Dept. 1934). *Motion for reargument denied; motion for leave to appeal denied.* 242 App. Div. 649 (2d Dept. 1934). It has been held, Drummond v. Dolan, 155 App. Div. 449, 140 N. Y. Supp. 307 (2d Dept. 1913) that the proof in bastardy proceedings should be entirely satisfactory, and where the case is decided against the defendant, a *sedulous scrutiny* of the record by the appellate court is indicated; an order of filiation made by a divided court should be vacated and a new trial granted. Judge Jenks said: "Moreover, the charge is so easy to make and so hard to defend that there should be a sedulous scrutiny of the record." Flores v. State, 72 Fla. 302, 73 So. 234 (1916) holds that frailty of evidence is no bar to its admission in a bastardy proceeding. The above citations, of course, deal with bastardy and not civil proceedings, but the underlying principle in determining paternity remains the same.

[7] "New concepts must beat down the crystallized resistance of the legally trained mind that always seeks precedent before the new is accepted into law." *Supra* note 5, at 900. "The same arguments which might be advanced against the test here sought have, from time immemorial, been urged whenever a step has been taken which marked progress; but the law is not static." *Id.* at 901.

[8] Schroeder, *supra* note 2, at 286.

[9] Babcock v. Fitchburg R. R. Co., 140 N. Y. 308, 35 N. E. 596 (1893); People v. Harris, 209 N. Y. 70, 102 N. E. 546 (1913).

[10] Wiener, *supra* note 2, at 70.

[11] There is no living authority of repute who may be cited adversely. The acceptance of the fundamental discovery of Landsteiner has been universal; there is still debate and controversy concerning recent advances in the same field and their application as refinements.

The objection has been raised that the test is of negative force and application.[12] There is universal accord among scientists that such is indeed the case: the test operates in the negative. This should be no bar to the acceptance of the procedure in law; the admission of alibi evidence is of similar negative character and not susceptible of the same probative evaluation as the non-paternity test.[13] The Anglo-Saxon mind prefers direct and positive evidence; however, it does not hesitate to accept the negative proof of alibi. The conclusive character of such negative evidence in the matter under discussion has led Dr. Dyke, in a recent British publication,[14] to say:

> "I need lay no stress upon the importance of being able even in a limited number of cases to demonstrate non-paternity."

It must be understood that the court's refusal to admit the application of evidence that is universally accepted by scientific authority deprives the defendant of his soundest chance of establishing his innocence.[15] Especially in bastardy proceedings is this true. Such

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[12] The Appellate Division memorandum says: "A blood test of the defendant and the child [and mother] may possibly determine his non-paternity, but it is not claimed, as we understand the record, that such a blood test would determine the defendant's paternity." *Supra* note 6. See also, Heise, *Some Medicolegal Aspects of Iso-agglutinins* (1934) 4 AM. JR. OF CLIN. PATH. 400.

[13] "Thus an innocent man stands a chance to prove non-paternity by blood tests which vary from one to two to one to seventeen. On the average, in advance of knowledge of his blood group, his chance of absolutely exonerating himself is one to seven. Should it be found that his blood group is that of the father of the child, his case should not be considered unduly prejudiced unless all other possible fathers are also tested and eliminated save he. Of course, if the father is shown to belong to the rare group AB and he [the defendant] happens to belong to that group a certain shadow of suspicion falls on him. Should the tests show that his blood group is an entirely impossible one for paternity in the particular case in point, he has of course established a satisfactory alibi." Parr, *The Solution of Medicolegal Problems by Blood Grouping Tests* (1932) 1 JR. M. A. ALABAMA 429, at 433.

[14] *The Human Blood Groups* (1933) 1 MEDICO-LEGAL & CRIMIN. REV. 99. In the discussion, Sir Bernard Spilsbury, at 114, said: "Taking paternity, it is easy to say in certain cases, that a certain person cannot have been the father of the child in question; but it is difficult to assert that such a person is the father of the child; you cannot say more than that he possibly may be. Therefore it is important to make our Courts appreciate the problem from that point of view, so as to enable this test to be established for medico-legal application. It can do nothing more than prove the innocence of a person; it cannot prove guilt. If we make that problem clear, the application of this test may be accepted more readily by our Courts than it is at the present time."

[15] Particularly should this be considered since the standard of proof established for bastardy proceedings is neither criminal nor civil, neither flesh nor fish, but an arbitrary hybrid. The criminal standard of proof beyond a reasonable doubt is purely qualitative in nature; the civil analogue of proof by a preponderance is purely quantitative. The standard of "entirely satisfactory proof" in bastardy proceedings is indefinite, indefinable and arbitrary. *Supra* note 6.

proceedings are quasi-criminal in this jurisdiction;[16] with the tender regard the law has for the defendant in criminal actions (permitting reputation evidence[17] that is excluded under analogous situations in civil cases), it seems illogical and harsh to exclude any evidence bearing on innocence in quasi-criminal actions.[18]

It has been urged that an insufficient number of cases of proof of non-paternity by blood tests exists.[19] In law, and likewise in legal medicine, it may be said that proof is not convincing in proportion to the number of witnesses, but depends essentially on the nature and quality of the testimony offered. The gist of the matter is qualitative rather than quantitative.[20] Yet, it is true that Schiff had collected 5,584 cases from Teutonic and Scandinavian jurisdictions alone, five years ago; there have since been many thousands added from the same and other foreign jurisdictions.[21]

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[16] People v. Colgrove, 63 Hun 635, 18 N. Y. Supp. 370 (General Term, 5th Dept. 1892); Simis v. Alwang, 48 App. Div. 529, 62 N. Y. Supp. 1067 (2d Dept. 1900).

[17] In filiation proceedings good character is admissible in evidence. Webb v. Hill, 115 N. Y. Supp. 267 (1909).

[18] "And it is highly probable that some innocent young men have been forced into marriage with a woman for whom there is no real affection, into parenthood of a child to which they are not related, and into check or ruin of a promising career, in ignorance of the fact that there was a chance, sometimes a good one, of proving non-paternity." Duhig, *Blood Grouping in Proof of Paternity* (1933) 24 MED. JR. AUSTRALIA 545. See also, Heise, *supra* note 12, at 400: "Therefore, assuming the same distribution of guilt and innocence in European and American groups, we must conclude that one half the defendants in fornication and bastardy cases are falsely accused of at least half of the charge. Also since accusations of bastardy are usually impossible to disprove by the methods now in use in this country, convictions are almost certain to follow, or if the cases are settled out of court in order to avoid scandal, a legalized form of blackmail is possible."

[19] A fundamental scientific fact proved once may be reproved but gains nothing in accuracy or truth. The heredity of blood groups was announced by Epstein and Ottenberg in (1908) 8 PROC. N. Y. PATH. SOC. 187; it has been confirmed many thousands of times. See LATTES, INDIVIDUALITY OF THE BLOOD (1932). There is no claim that non-paternity tests seek to usurp the functions of the court. The German postulate of proof of obvious impossibility of paternity cannot be met by any scientific or legal machinery devised by man and would lead to invariable conviction if strictly applied. To hold a man to a standard of proof more stringent than the harshest rules of common law contract holdings imposed is unreasonable.

[20] The defendant should be accorded the advantage of the possibility of innocence granted in criminal cases, to balance the quasi-presumption of paternity which circumstances and the difficuly of proof to the contrary force upon him. "By an arbitrary rule, to preclude a party from adducing evidence which, if received, would compel a decision in his favor, is an act which can only be justified by the clearest expediency and soundest policy; and it must be confessed that there are several presumptions still retained in this class which never ought to have found their way into it, and which, it is to be feared, often operate seriously to the defeat of justice." BEST, PRESUMPTIONS OF LAW AND FACT (1844) §18.

[21] SCHIFF, BLOOD GROUPS AND THEIR APPLICATION (1933); *Lattes, supra* note 19.

Objection has been offered that the non-paternity test and its interpretation is not sufficiently *obvious*[22] for judicial consideration. The legal fraternity, without special and authoritative knowledge, seems to insist upon evaluating the intrinsic phenomena of non-paternity tests. It is said that this is done to preserve the norm as encountered in the mind of the average juror. This calls for the observation that the phenomena and argot of science are unintelligible to the untrained or misinformed. It is, perhaps, as necessary to assume in science that everyone apprehends the significance of natural phenomena as it is to presume in jurisprudence that everyone knows the law. The pragmatic application of these doctrines, in either case, leaves something to be desired;[23] but it is no more unreasonable to assume that the intelligent lawyer has a nascent appreciation of the phenomena of science than it is to make it conclusive on the scientist that he knows the law. The heredity of blood groups and the application thereof is as *obvious* to the scientist as is the rule against perpetuities and the application thereof to the lawyer; that some of each class do not apprehend the respective subjects with desired clarity of vision, and, that such esoteric wisdom is not *obvious* to members of the opposite profession is merely evidence of the woeful ignorance under which humanity labors.[24] It is more than likely that the average juror understands neither learning, but is competent to pass upon the ultimate facts. But, wilful interpretation of the rule against perpetuities by a scientist, without special knowledge thereof, borders on the absurd; the attitude of many lawyers toward the evaluation of the heredity of blood groups is not far removed. The physical manifestation of a non-paternity test as a corporeal characteristic is as obvious to a scientist as an external body wound; and as between the two, an expert opinion, expressed with mathematical accuracy, is by far the more obvious on the side of the non-paternity test. The acceptance of the heredity of blood groups has become tradition and habit in the international community of science. Mr. Justice Holmes has said:[25] "Tradition and the

[22] The word, *obvious,* is shaded by a variability of individual reception of facts and capability of drawing conclusions that is as arbitrary and whimsical as an "entirely satisfactory" standard of proof.

[23] "My experience as a judge in other fields of law has made me distrustful of rules of thumb generally. They are a lazy man's expedient for ridding himself of the trouble of thinking and deciding." CARDOZO, LAW AND LITERATURE (1931) 92.

[24] "More and more we lawyers are awaking to a perception of the truth that what divides and distracts us in the solution of a legal problem is not so much the uncertainty about the law as uncertainty about the facts—the facts which generate the law. Let the facts be known as they are, and the law will sprout from the seed and turn its branches toward the light. We make our blunders from time to time as rumor has it you make your own. The worst of them would have been escaped if the facts had been disclosed to us before the ruling was declared." Cardozo, *id.* at 75.

[25] Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 30 Sup. Ct. 301 (1910).

habits of the community count for more than logic." But, science has in addition the proof necessary to convince the mind in logical as well as in traditional manner.[26]

In the process of clearing away the underbrush to reach the path of the law in this problem, it may be emphasized again that the attitude of the legal fraternity in trespassing upon the domain of legal medicine seems antagonistic and perverse rather than helpful in fostering the growth of the law and furthering the ends of justice. Laymen are acquainted with the prominent advances of medical science through journals published in popular vein from authoritative sources.[27] To be rebuffed on the threshold of the law is the situation of the informed citizen of this jurisdiction, perhaps wrongly accused of paternity in a bastardy proceeding or action for civil assault. The life of the law is experience, according to Mr. Justice Holmes.[28] The law should profit by the experience of trained observers in special fields.[29]

Narrowing the discussion to the jural aspects of the problem, there seems to be no logical or legal ground for excluding such evidence or denying a court the power to order such evidence obtained in civil and criminal proceedings; and this is true and arguable even from the limited view of procedure.

The assertion is often made that examination of the person of a litigant, in particular the plaintiff, in regard to corporeal manifestations was not permitted at common law. This is true only in the sense of a vague generality; exceptions of several forms existed.[30] Of particular moment are the common law precedents, if such there must be,[31] in relation to the determination of paternity. We may indulge in the fiction that the child, for legal purposes, is without a father until the law settles the question; the mother is bringing suit

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[26] United States v. Provident Trust Co., 291 U. S. 272, 54 Sup. Ct. 389 (1934) where Mr. Justice Sutherland said: "It was not until a comparatively recent period, therefore, that the effect of such an operation [pan-hysterectomy] was disclosed to observation, and the incontrovertible fact recognized that a woman subjected thereto was permanently incapable of bearing children."

[27] (1932) 10 HYGEIA 981, where Calvin Goddard said in regard to non-paternity tests: "Here again, there is but a certain percentage of cases in which the tests yield positive conclusions, but this is nevertheless a welcome advance over the days when there was no certain test applicable in any such case."

[28] *Supra* note 4.

[29] Duhig, *supra* note 18, at 546: "Since a person inherits his blood groups in both systems for life, we have in them a fixed, unalterable character, and moreover the scheme of inheritance is no longer a matter of conjecture, but of certainty. The time is therefore well due for making investigations of this kind in affiliation cases an obligatory part of our legal system. I think that judges and magistrates who neglect to order tests of the kind indicated, run the risk of inflicting grave and lifelong injustice."

[30] See Notes (1891) 14 L. R. A. 466; see also *infra* notes 31 and 35.

[31] "The silence of common law authorities upon the question in cases of this kind proves little or nothing." Mr. Justice Brewer dissenting in Union Pacific Ry. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000 (1890).

not only for her benefit but also for that of the child; the sovereign power, in bastardy proceedings, brings action not only to benefit the public and the particular mother, but also the child; the child, therefore, is a proper party before a court, especially in civil actions in jurisdictions where law and equity have been merged.

Among the significant common law precedents, we have *Annesley* v. *Anglesea*[32] from venerable antiquity (1743) which holds that it may be shown that a child bears no resemblance to the purported father. In the *Douglas Peerage* case[33] (1769), Lord Mansfield allowed the admission of evidence of likeness and dissimilarity. Evidence of dissimilarity in racial characteristics was permitted in the New York case of *Almshouse Commissioners* v. *Whistelo*.[34] Evidence of hereditary characteristics and corporeal peculiarities is permissible and should be demonstrated to the jury, is the holding in *Piercy's Peerage* case.[35] Evidence is admissible of special traits in which a child resembles the putative father and family; and the child may then be introduced to enable the jury to pass upon the alleged resemblances, holds the court in *Utah* v. *Anderson*.[36]

The common law, therefore, contains respectable, authoritative precedent for the demonstration of similar and dissimilar physical traits and hereditary peculiarities in the determination of paternity. The hereditary character of blood groups provides a peculiar physical trait as obvious as polydactylism.[37] Competent expert testimony and facts are for the jury to pass upon; the arbitrary withholding of such facts and opinion testimony in regard thereto may suffer great injustice to be done.[38] Nor can it be properly said, on the statis-

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[32] 17 How. St. Tr. 1139 (1743). Of historic interest are the researches of Schiff, (1929) 55 Deutsch. Med. Wchnschr. 1141, with reference to determination of descent in antiquity. He points out that the courts, despite modern science, still tend to adhere to the view expressed by Paulina in Shakespeare's *Winter's Tale,* Act II, Scene 3. More startling by analogy is his quotation of Prof. Hübotter's translation from Hsi Yuan Lu: "If the remains of father and mother rest elsewhere, and son or daughter desire to recognize them, let them prick themselves so that blood will drop on the bones; if they are related by blood, it will penetrate the bones; if it happens they are not related by blood, the named result will not follow." More proximate is the legal recognition by Chinese and Japanese authority of the propriety, as proof of descent, of mixing the blood of litigants in a bowl to observe coagulation phenomena!

[33] 2 Hargrave, Coll. Jur. (1769) 402.

[34] 3 Wheeler, Cr. C. (N. Y. 1808) 194.

[35] 12 How. St. Tr. 1199; see also (1926) 40 A. L. R. 99, 136.

[36] 63 Utah 171, 224 Pac. 442 (1924).

[37] Shull, Heredity (1931) 263, 264.

[38] (1932) 60 Medical Times 203 *et seq.: Symposium on the Forensic Value of Tests for Blood Grouping.* In the discussion, Judge Steinbrink said in part: "There can be no doubt but that injustice does frequently creep in, especially in cases of disputed paternity handled in the Corporation Counsel's office, where the machinery for detecting the truth is somewhat limited. Likewise the machinery of our courts is not yet so well or properly oiled to attain the exact truth and exact justice in each case. Since we cannot measure out justice on a scale, we must adopt the next best means."

tics available, that the minority suffers for the good of the majority. It is desirable as a matter of sound public policy that there be a restraint placed upon the production of bastards; but a substantial incidence of unsound determinations exists as a result of excluding competent, material and *relevant* evidence.[39]

Bastardy proceedings are considered civil in nature in many jurisdictions. New York assumes the position that such actions are quasi-criminal. The fathering of a bastard, *per se,* does not constitute a specific crime at common law; under the statutory law, the failure to support such progeny, foisting it upon the commonwealth as an actual or semi-public charge, seems to make out the criminal element.[40] The determination of paternity relates clearly to the civil phase of the action and should be governed by the civil rules of procedure; or, if the quasi-criminal flavor permeates the entire substance of the action, civil rules should temper the character of the proceeding. In *Taylor* v. *Diamond,*[41] the Appellate Division said, however, that the Court of Special Sessions, in the absence of statutory authority,[42] has no power to order the drawing of blood for non-paternity tests in advance of trial in bastardy proceedings. This holding seems inconsistent with the logic of the situation. Particularly is this true and to be deprecated in view of the arbitrary standard and difficulty of proof in such actions.[43]

In view of the quasi-civil, as well as quasi-criminal, nature of bastardy proceedings in New York, precedent for submitting the plaintiff to physical examination exists at common law in early, lower court decisions; certainly, such holdings may be brought into relation with actions for civil assault.[44] The trend in New York seemed favorable to permitting examinations in personal civil actions until the decision of *McQuigan* v. *Delaware, Lackawanna & Western R. R. Co.*[45] which followed *Roberts* v. *Ogdensburg R. R. Co.*[46] In the former case, a unanimous Court of Appeals held that examination of the plaintiff before trial on application of the defendant in a civil action is not permissible in the absence of statutory authority; the Supreme Court has no power derivable from the common law to order such examination. Judge Andrews leans heavily upon the decision in *Union Pacific Ry. Co.* v. *Botsford.*[47] If the latter case is unsound, then it follows that the *McQuigan* case is an unsound

[39] *Supra* notes 13, 14, 18 and 24.

[40] People v. Snell, 216 N. Y. 527, 111 N. E. 50 (1916). For procedural details see CODE OF CRIMINAL PROCEDURE §§838-860.

[41] 241 App. Div. 702, 269 N. Y. Supp. 799 (2d Dept. 1934).

[42] Referring to INFERIOR CRIMINAL COURTS ACT, art. V, §70.

[43] *Supra* note 20.

[44] *Supra* notes 30 and 35.

[45] 129 N. Y. 50, 29 N. E. 235 (1891).

[46] 29 Hun 154 (General Term, 3d Dept. 1883), which held the sacredness of the person a bar to examination at request of the defendant.

[47] *Supra* note 31.

reversal of lower court decisions. Mr. Justice Sutherland has said: [48] "A wrong decision does not end with itself; it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other."

Mr. Justice Gray, in the *Botsford* case, bases his views on denying the right to examination in advance of trial on the theory of trespass.[49]

> "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages,[50] now mostly obsolete in England, and never, so far as we are aware, introduced into this country."

On close examination and analysis, it may be said with confidence that the opinion of Mr. Justice Gray is the expression of an outraged sense of decency rather than a pronouncement of justice. It is unsound and unjust [51] in application to negligence actions as time has shown; but, in the words of Mr. Justice Sutherland, "its bad influence has run from one extremity of the arc to the other" and today plagues us and obfuscates the administration of justice in civil assault and bastardy proceedings in this jurisdiction when determination of paternity is an issue before the court.

The learned justice proceeds from premises of modesty and makes a scoffing sham of justice thereby.[52] Surely, the basis of his

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[48] Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923).

[49] *Supra* note 31.

[50] *Custom* in such ruder ages was to the contrary. The existing morality, or suspicion, enjoined the physician or barber-surgeon from examining and treating women unless under the most careful observation of relatives of the patient. Midwives attended women in labor. GARRISON, HISTORY OF MEDICINE (1917) 155, 225.

[51] Two justices dissented. Mr. Justice Brewer, *supra* note 31, wrote in part: "It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases in the interests of justice, or from other considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?"

[52] Interwoven with the "indignity," "compulsory stripping and exposure," "to compel anyone, and especially a woman to lay bare the body" is the mock modesty with which civilization has shrouded sex. A sense of delicate social proportion and personal dignity in matters sexual is one of the nobler aspects

logic in admitting that inspection of the female person in divorce actions, as authorized by "the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state," should apply equally well to bastardy proceedings by analogy. Surely, if "to protect the rightful succession to the property of a deceased person against fraudulent claims of bastards, when a widow was suspected to feign herself with child in order to produce a supposititious heir to the estate" an examination and restraint of the person was permissible, avoidance of injury to property was the basis of reason that moved the common law judiciary to set aside the sacred and inviolable rights of the person.[53] It requires no American precedent to realize that injury to property, whether real or personal, resulting proximately from failure to submit proper parties to skilled examination is unjust and arbitrary. Both the *Botsford* and *McQuigan* cases are unsound but overruled earlier common law holdings, the affirmance of which would have made legislative action, resulting in Section 306 of the Civil Practice Act,[54] unnecessary.

Similarly, the suggestion that it is an unwarranted trespass to subject the child involved in a particular bastardy or civil action to the drawing of blood, is angling beyond depth for an eel that will wriggle. By comparison, the continued trespass, sanctioned by law, upon the unfortunate defendant's property, liberty or both, in wrongly adjudged cases, seems an enormity quite in keeping with Mr. Justice Gray's "indignity, an assault and a trespass." If the child has any claims to support from the putative father, it seems reasonable and

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of man or woman. The learned justice may have had in mind such refinement of character and imputed it to the situation at bar. But the plain intendment of his words opens the avenue to the exploitation of sinister concealment, false modesty or both. False modesty, more often than not, is evidence of latent pruriency and viciousness. Such questionable virtue should not obstruct justice. The restriction with reference to examining female litigants is reflected in Civil Practice Act §306. See CALVERTON & SCHMALHAUSEN, SEX IN CIVILIZATION (1929) 605, 606.

[53] This is in harmony with the early views of precedent rights of property over those of personality, which actually existed in ruder ages and attended the infancy of common law. The evolution of the right of privacy in equity, and as expressed in the CIVIL RIGHTS LAW §§50, 51, refers to reasonable and justifiable limitations on the infringement of the individual's existence. Mr. Justice Gray's limitations on the right of privacy are neither reasonable nor justifiable. It shocks the intellect to realize that feminine modesty is superior to personal property interests, but subordinate to public policy and the right to succession to real property.

[54] The section reads: "In an action to recover damages for personal injuries, if the defendant shall present to the court satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court, by order, shall direct that the plaintiff submit to a physical examination by one or more physicians or surgeons to be designated by the court or judge, and such examination shall be had and made under such restrictions and direction as to the court or judge shall seem proper. If the party to be examined shall be a female she shall be entitled to have such examination before a physician or surgeon of her own sex. The order for such physical examination, upon the application of the defendant, may also direct that the testimony of such party be taken by deposition pursuant to this article."

equitable that it be subjected to a harmless and justifiable trespass in ascertaining the extent of the alleged father's liability when the court has all parties before it.[55] This is all the more proper when viewed in the light of law [56] which subjects the parent to criminal liability in event of not permitting or procuring more extensive trespasses to the person of the child for the purpose of healing disease.

In civil assault actions involving the determination of paternity, the liberal application of the rule laid down in *Hayt* v. *Brewster, Gordon & Co.*,[57] which permits the drawing of blood in connection with physical examination before trial under Civil Practice Act, Section 306, is indicated. The quasi-civil nature of bastardy proceedings should permit the adoption of a similar rule; or else the statute governing bastardy proceedings should be amended.

The weight of common law authority, permitting the exhibition of infants and children to the jury to establish resemblance is properly and reasonably not recognized in New York as a general proposition;[58] such exhibitions are prejudicial without serving an adequate purpose, except in special instances. But, startlingly enough, the legal insistence upon the defect of non-paternity tests as a negative consideration raises a subtle point. If the test were *positive* in form, establishing paternity, it would seem logical that a sound legal argument against admission of such evidence as coming under the rule of exhibition of similarities, not obvious to the jury, might be sustained. A clear distinction, however, exists between offering such evidence, and the presentation of a scientific criterion of dissimilarity. The complaining witness or plaintiff, as the case may be, and her child are in possession [59] of material and relevant evidence demonstrable

[55] The Appellate Division, *supra* note 6, said: "This child is not a party to this action, and while a court of chancery has an inherent jurisdiction over the welfare of an infant, a ward of the court, nothing in this case indicates that the welfare of this infant is in any wise involved or that the blood test could possibly be beneficial. Section 306 of the Civil Practice Act has no application to the facts of this case."

[56] PENAL CODE §§288, 289. See also People v. Pierson, 176 N. Y. 201, 68 N. E. 243 (1903).

[57] 199 App. Div. 68, 191 N. Y. Supp. 176 (4th Dept. 1921) where Judge Hubbs said: "The Legislature, in enacting said statute and thereby changing the common-law rule, must have intended that it should be of some practical assistance in the discovery of the truth. * * * There is no doubt about the reason for such enactment. Its purpose was to afford protection to defendants, to enable them to discover the truth in regard to injuries claimed to have been received by plaintiffs, and thereby to promote justice."

[58] *In re* Turnbull, 4 N. Y. Supp. 607 (1889); Bilkovic v. Loeb, 156 App. Div. 719, 141 N. Y. Supp. 279 (1st Dept. 1913); *In re* Wendel, 262 N. Y. Supp. 41 (1933).

[59] "We must steadily bear in mind that the inference of guilt to be drawn from possession is never one of law. It is an inference of fact." People v. Galbo, 218 N. Y. 283, 112 N. E. 1041 (1916). The established incidence of fraudulent or perjured claims by plaintiffs in bastardy and civil assault cases should make clear the necessity of an inference of guilt where the plaintiff refuses to submit herself or her child to non-paternity tests. Public policy demands that the economic ruin of innocent defendants be cured; blackmail by threat or duress in such cases is none too rare.

by recognized tests. The evidence constitutes an important factual question and not a matter of law. It is as though a material fact is suppressed, when subtleties and procedural niceties of questionable authenticity in common law origins and existing statutory privileges, prevent the admission of non-paternity tests as evidence. Strange, and in a sense incomprehensible, it is that a jurisdiction which liberally sanctions trespass and admits evidence in criminal cases [60] obtained by methods condemned by the United States Supreme Court,[61] should be ultra-technical in civil assault and bastardy proceedings, and subject the defendant to an arbitrary standard of proof, the rigorous and stringent rules of both criminal and civil actions, and permit the merciful immunities and privileges of neither. In excluding evidence of non-paternity tests, directly or by indirection as a procedural matter, a grave injustice is being done. Particularly is this so, since the alleged necessity for legislative cure is an admission of existing error. The test does not seek to establish guilt; it looks toward the possible discovery of innocence. Especially in criminal or quasi-criminal cases this should favor admission as evidence, in accord with the so-called advantage or presumption of innocence which common law principles established. As such, it is *some evidence,* and should properly be admitted as relevant to the issue.

The question of expert testimony arises in the interpretation of non-paternity tests. Such tests are capable of demonstration in the courtroom, if necessary; they may be performed by experts for either side, by state experts, or all in collaboration. The court may hear the testimony of any or all such witnesses. There is no confusion of concepts on this subject; it would offer one of the few instances in medicine where the interpretation of a test follows with mathematical preciseness from factual premises. Under proper circumstances,[62] such evidence should be of some value in the majority of civil assault and bastardy cases in which paternity is an issue.

There is a prevalent notion that courts exist to dispense "natural justice." [63] The adoption of such an irregular and unsystematic code

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[60] People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926); see also People v. Gardner, 144 N. Y. 119, 38 N. E. 1003 (1894).

[61] Silverthorne Lumber Co., Inc. v. United States, 251 U. S. 385, 40 Sup. Ct. 182 (1920); United States v. Lefkowitz, 285 U. S. 452, 52 Sup. Ct. 420 (1932).

[62] "The hired expert, simply because he is hired, lays himself open to the suspicion of bias. Not infrequently this suspicion appears to be well founded. The contentious method of presenting expert testimony has bred a type of expert whose opinion appears to be purchasable. * * * The expert witness may have a firm and honest opinion and may be thoroughly honest and impartial in presenting it. But what Maguire has called 'the ignorance, haggling and artificial restrictions with which lawyers and some judges alike sometimes confuse presentation of specialized information' may place the honest expert in such a position that he is 'forced to contend for the correctness of his opinion. Having been forced into a combative and contentious attitude, he loses his value as an impartial expert." Schultz, *supra* note 3, at 555, 556.

[63] "I have received many letters from people who seem to suppose that I have a general discretion to see that justice is done. They are written with the

would strike at the very roots of Anglo-Saxon common law. However, when new phases of knowledge are established, the law should respond to the internal pressure of the thing it seeks to control. It is possible, and even probable, that in the *Beuschel* and *Taylor* cases, the non-paternity tests would have been of no conclusive value; but this carries no weight as to the general materiality, relevancy and competency of such evidence. The writer respectfully submits that the Appellate Division, perhaps bound by the tradition and custom of an intermediate appellate tribunal, erred in the sweeping generalization of its reversal. There is urgent necessity for the Court of Appeals to pass on the matter under discussion; it is to be hoped that an early opportunity arises for the progressive and enlightened court as it exists today to consider the question. Should the Court of Appeals find it impossible to reconcile the situation with adverse but unsound precedents, it might be urged that the finest ingots of common law justice are poured from the crucible in which *form and fact* [64] are melted indissolubly into the substance that constitutes law. If, then, the ruling is adverse to the admission of non-paternity tests in evidence, the remedy lies with the legislature. The established phenomena of the heredity of blood groups, their interpretation and application, as recognized in many civilized nations today, should be made available to the state and to litigants before its courts in criminal [65] and civil cases.

EMIL F. KOCH.

CHARITABLE TRUSTS—DEFINITIONS AND HISTORY—PURPOSE—BENEFICIARIES—CY PRES DOCTRINE.

What is a charitable trust? The term is synonymous with the terms public trust and charity.[1] The definition formulated in a Massachusetts case has been extensively quoted:

> "A charity in the legal sense may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bring-

confidence that sometimes goes with ignorance of the law." Mr. Justice Holmes, *In re Sacco and Vanzetti*, N. Y. Times, Aug. 21, 1927; FINKELSTEIN, CASES ON CONSTITUTIONAL LAW (1927) 511.

[64] Cardozo, *supra* note 23, at 5: "Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity." It may be said that form without substance is a mere and ugly protuberance in the legal scheme of things.

[65] (1932) 3 AMERICAN JR. OF POLICE SCIENCE 157 discusses the application of blood groups in forensic medicine; see also (1932) 87 N. Y. L. J. 810.

[1] BOGERT, TRUSTS (1921) 189.